

No. 78-391

Supreme Court, U. S.

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MICHAEL RUDAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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GEORGE F. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General  
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Washington, D.C. 20530*

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Petitioner seeks review of his conviction for filing false income tax returns on the grounds that the government improperly used a federal agent to summarize for the grand jury the testimony heard by another grand jury, that the government withheld exculpatory evidence, and that the government did not disclose prior to trial that one of its witnesses had been given immunity.

After a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted on two counts of filing false federal income tax returns for 1974 and 1975, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent three-year terms of imprisonment, with all but 180 days of the sentence suspended, to be followed by three years' probation (Pet. App. 18). The court of appeals remanded the case to the district court for an *in camera* inspection to determine whether the Internal Revenue Service's files contained any exculpatory

evidence that was material to the guilt or punishment of petitioner or that might have affected the outcome of the trial. The district court was directed to take appropriate action in the event it found any exculpatory evidence; otherwise, it was directed to enter an order affirming the judgment of conviction and sentence (Pet. App. 25). The district court has not yet acted on remand.

The facts may be summarized as follows: Petitioner was the Executive Director of the Beer Industry League of Louisiana and was in a position to influence legislation with respect to breweries. The evidence showed that after the Louisiana legislature had enacted legislation favorable to breweries, petitioner demanded and received a \$15,000 cash payment from the Dixie Brewing Company in 1974 and a \$15,000 cash payment from the Falstaff Brewing Company in 1975 in connection with his activities with respect to the legislation. Petitioner failed to report these payments on his federal income tax returns for 1974 and 1975 (Pet. App. 17-18).

Petitioner did not testify at trial and presented only character witnesses in his defense. In his closing argument to the jury, petitioner's counsel conceded that petitioner had received the unreported cash payments but argued that petitioner was merely a courier who had delivered the money to other unidentified individuals (Tr. 243-248).

1. The petition for a writ of certiorari is premature in light of the court of appeals' remand of the case to the trial court with instructions to make an *in camera* inspection of the Internal Revenue Service audit work papers to determine whether they contain any exculpatory evidence (Pet. App. 24-25). If the district court sets aside the conviction, petitioner's claims will be moot. If, however, the district court enters an order on the mandate affirming the conviction, petitioner will then be able to

seek review of the final judgment. See *Firemen v. Bangor & A. R. Co.*, 389 U.S. 327 (1967); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-259 (1916).<sup>1</sup>

2. a. Petitioner first argues (Pet. 5-7) that the government improperly presented evidence to the grand jury. The pertinent facts are as follows: A grand jury sitting in the United States District Court for the Eastern District of Louisiana initially investigated the alleged illegal payments made by Dixie Brewing Company and the Falstaff Brewing Company on the premise that the payments were directed to parties other than petitioner. This grand jury heard the testimony of Lauren W. Gregg, Jr., a marketing manager for Falstaff. In his first appearance before the grand jury on September 9, 1976, Gregg testified that he had made a \$15,000 cash payment to petitioner by using the proceeds of a check that he had received from Falstaff. In his second grand jury appearance, on October 14, 1976, Gregg corrected his prior testimony, stating that in making the payment to petitioner he had in fact used \$8,000 of his own personal funds, along with \$7,000 obtained from another Falstaff official, Sidney P. Becker, Jr., and that he and Becker were subsequently reimbursed by check from Falstaff (Tr. 44-47). The grand jury returned indictments against petitioner and others which alleged that the Falstaff and

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<sup>1</sup>Relying on the opinion of Judge Rubin, concurring in part and dissenting in part (Pet. App. 26-31), petitioner argues (Pet. 10) that the *in camera* inspection required by the court of appeals cannot adequately protect his rights. But since the district court might set aside the conviction on remand, the argument is premature. At all events, petitioner's argument that he has a right to a complete inspection of the prosecutor's files was expressly rejected by this Court in *United States v. Agurs*, 427 U.S. 97, 108-110 (1976). Finally, there is no basis for petitioner's assertion (Pet. 10) that he cannot seek appellate review of the trial judge's decision on remand. See *United States v. Conder*, 423 F. 2d 904, 911 (6th Cir.), cert. denied, 400 U.S. 958 (1970).

Dixie payments were part of a conspiracy to use interstate facilities to commit a crime, in violation of 18 U.S.C. 1952 (Pet. 4-5).

A second grand jury was subsequently convened in the Middle District of Louisiana to investigate further the alleged illegal payments. The evidence presented to this grand jury consisted of the testimony of a government agent who summarized the live testimony presented to the first grand jury. The second grand jury indicted petitioner on two counts of filing false federal income tax returns, in violation of 26 U.S.C. 7206(1) (Pet. App. 18).

Petitioner asserts (Pet. 6-7) that the government improperly used a federal agent to summarize for the second grand jury the testimony heard by the first grand jury. In petitioner's view, the hearsay summation deprived the second grand jury of evidence bearing on credibility (*i.e.*, the fact that in his two appearances before the grand jury Gregg gave inconsistent statements regarding the source of funds paid to petitioner), which might have prevented an indictment. But an indictment based solely on hearsay evidence does not violate the Fifth Amendment. *Costello v. United States*, 350 U.S. 359 (1956). See also *United States v. Calandra*, 414 U.S. 338, 345 (1974). Thus, the court of appeals correctly concluded that petitioner was not prejudiced by the summarized testimony of the witness (Pet. App. 19):

A defendant has no right to require that the Government present all available evidence at this [grand jury] proceeding. The grand jury proceeding is a one-sided affair. The defendant is protected from such one-sidedness when, at the trial on the merits, he is "accorded the full protections of the Fifth and Fourteenth Amendments" and is "permitted to expose all the facts bearing upon his guilt or

innocence." *United States v. Chanen*, 549 F. 2d 1306, 1311 (9 Cir. 1977) [cert. denied, 434 U.S. 825 (1977)].<sup>2</sup>

See also *United States v. Cruz*, 478 F. 2d 408 (5th Cir. 1973), cert. denied, 414 U.S. 910 (1977); *United States v. West*, 549 F. 2d 545, 553-555 (8th Cir.), cert. denied, 430 U.S. 956 (1977).<sup>2</sup>

b. Petitioner further contends (Pet. 7) that the decision below conflicts with *United States v. Estepa*, 471 F. 2d 1132 (2d Cir. 1972), and *United States v. Umans*, 368 F. 2d 725 (2d Cir. 1966), cert. granted, 386 U.S. 940 (1967), cert. dismissed as improvidently granted, 389 U.S. 80 (1967). In *Estepa*, the court explained that hearsay evidence could be presented to a grand jury except where the grand jury would be misled as to the nature of the evidence or where there was a "high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted" (471 F. 2d at 1137). Here, on the other hand, there is nothing that would indicate that the second grand jury was misled as to the nature of the evidence or that it would not have indicted with eyewitness rather than hearsay testimony. Indeed, the contrary inference would seem to follow in light of the fact that the first grand jury heard the live testimony of Gregg and subsequently returned an indictment against petitioner. The source of the \$15,000, of course, was irrelevant to petitioner's failure to report the income on his tax returns.

c. Finally, petitioner asserts (Pet. 11-12) that he was denied a fair trial by the government's failure to advise

<sup>2</sup>Petitioner's counsel was furnished with the transcripts of Gregg's two appearances before the first grand jury and thoroughly cross-examined Gregg at trial with respect to his prior inconsistent statements regarding the source of funds paid to petitioner (Tr. 44-47).

him promptly that Gregg had been granted immunity. But as the court of appeals noted (Pet. App. 21), there was some evidence that petitioner's counsel was aware before trial that Gregg had been granted immunity, and in any event, petitioner certainly knew of the immunity during trial and thoroughly cross-examined Gregg with reference to it. The district court carefully considered the circumstances surrounding the grant of immunity to Gregg and ruled that petitioner was not prejudiced by any delay in finding out about the immunity grant (Tr. 220-221). This factual determination was affirmed by the court of appeals (Pet. App. 21) and does not merit further review. See *DeMarco v. United States*, 415 U.S. 449 (1974).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

NOVEMBER 1978